In the

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY CRAINE,
Appellant,
vs.
PACIFIC STEAMSHIP COMPANY, a Corporation, and
OLIVER CHILLED PLOW WORKS, a Corporation,
Appellee.

Brief of Oliver Chilled Plow Works, Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Oregon.

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F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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STATEMENT

The defendant in error, Oliver Chilled Plow Works, appearing separately, filed a demurrer to the amended complaint, which demurrer was sustained by the Court. On the failure of plaintiff to further plead, and without any application made therefor or leave given to so plead, the Court after due notice to plaintiff in error rendered judgment of dismissal in favor of this defendant in error. The sole question for review is the ruling of the Court in sustaining the demurrer. The two principal contentions of this defendant, urged at the argument, were that the complaint failed to show that the alleged acts of this defendant were in violation of any duty it owed to the plaintiff; and secondly, that this defendant's al-

leged acts were not the proximate cause of the injury. The Court sustained the demurrer on the first contention, but did not pass upon the last. In the brief we shall make both contentions.

POINTS AND AUTHORITIES

I.

A potato digger in the condition described in the complaint is not an article inherently or imminently dangerous so as to create in the shipper a liability to persons injured, independent of contract.

S. P. Roddy v. Missouri R. Co., 104 Mo. 234; 12 L. R. A. 746.

Burke v. Sugar Company, 11 Hun. 354.

The Mary Stuart, 5 Hughes, 312.

Loop v. Litchfield, 42 N. Y. 351.

Zieman v. Kieckhefer Elevator Co., 90 Wis. 497; 63 N. W. 1021.

Hiczer v. Kingsland Mfg. Co., 110 Mo. 605; 15 L. R. A. 821.

II.

After the delivery of the article by the shipper to the common carrier, the failure of the common carrier to inspect the article and warn its servant of latent dangers is the proximate cause of the injury, and the shipper is not liable.

Fowles v. Briggs, (Mich.), 40 L. R. A. 528.

ARGUMENT

Before there is a liability for a tort, there must be a breach of duty owed to the injured person by the one whose acts may have caused the injury. It is not sufficient in a case to show merely that the act of the defendant was the cause of plaintiff's injury, but defendant's act is not actionable unless it involved a violation of a duty the law imposes. Whether a duty has been violated depends to a large degree upon the relations of the parties to each other. The master owes a duty to a servant in the discharge of his work that he does not owe to a stranger.

In the present case the plaintiff was the servant of the Pacific Steamship Company, and not the servant of this defendant in error. The Steamship Company had the right to direct the plaintiff and did direct the plaintiff. This defendant in error did not have such right, nor did it assume such right. The Steamship Company was in control of the premises upon which the plaintiff was injured, and of the instrumentalities used in the work. This defendant in error was not. This defendant in error was not the master of plaintiff, and did not owe to him a master's duty. It owed the plaintiff the same duty it owed to a stranger, no greater and no less.

The appellant may seek to avoid the propositions above stated by invoking certain allegations of the complaint in an attempt to show that that there was some relation assumed by this defendant in error toward the plaintiff. It is now our purpose to antici-

pate the appellant to that extent, in order to show that there was no relation between them as shown by the complaint. This calls for a construction of the pleading.

In Paragraph VI of the amended complaint the dangerous condition of the digger is alleged, and then follows: "all of which was well known to *defendant* by properly inspecting the said digger before directing the plaintiff and other longshoremen to carry said digger aboard said steamship, as plaintiff was required to do, as it was *defendant's* duty so to do." The defendant referred to, it may be inferred, is the Steamship Company, but it cannot be inferred that this defendant in error is meant, because this defendant had nothing to do with loading the ship, and had no right or authority to command or give orders to plaintiff.

In Paragraph VII, it is alleged: "It was the duty of the *defendants* to provide plaintiff with a safe place to work, and to inform plaintiff of any hidden or latent dangers in connection with said work." That is a conclusion of law merely, and has no force whatever, unless the complaint alleges such relation between the parties as would create such duty. It was not the duty of this defendant, Oliver Chilled Plow Works, to provide plaintiff with a safe or any place to work, nor to inform him of hidden dangers, because the complaint does not allege that plaintiff was in the employ of defendant, but does affirmatively allege that plaintiff was in the employ of the Steamship Company. (Par. III of the complaint.) There

being no facts alleged to support the legal conclusion, as to this defendant's duty, the legal conclusion must be disregarded. This leaves the complaint presenting the single question whether this defendant, not being the master of plaintiff nor directing his work, violated any duty owed to the plaintiff in doing the acts charged against it in the complaint.

The law is so well settled it is no longer debatable that one person delivering an article to another is not liable to the servant of the recipient for injuries caused in the handling of the article, unless the article belongs to the class of goods which are imminently or inherently dangerous. If such goods are imminently dangerous, a liability is created in favor of anyone, even though a stranger, who may be injured from the article without proper warning from the shipper. This is known in the law as liability independent of contract. In the application of this rule the courts have universally confined imminently dangerous articles to poison, firearms and explosives. The article must be of such a character that an ordinary person could not know, or ascertain by ordinary prudence, the danger he would incur by coming in contact with the article, and of such a character, that imminent danger of an injury, to the person handling it would naturally result.

In *Loop v. Litchfield,* 42 N. Y. 357, the court defines imminently dangerous articles as follows:

> "They are the instruments and articles in their nature calculated to do injury to mankind, and

are generally intended to accomplish that purpose; they are essentially and in their elements instruments of danger."

We contend, and the lower court so found, that the article described in the complaint does not come within the classification of *imminently* or *inherently* dangerous articles so as to impose a liability upon the consignor in favor of the servant of the carrier; that is to say, a liability independent of contract. The article is designated in the amended complaint as a potato digger. It is a plow especially constructed for digging potatoes. It is alleged that the blades were concealed from view and should have been removed or boxed in so as to protect persons in handling the article. From this description the Court is asked to adjudge the article of a class or kind so imminently dangerous that injury would naturally result to a person placed in the position of plaintiff. This defendant is in the business of delivering this kind of machinery, it can be inferred from the complaint, and it is not alleged that the plow was packed in any manner different from the usual way. It would seem that a longshoreman of reasonable prudence could handle a plow packed in the usual manner without injuring himself. But whether that is so or not, the proposition we are making is that the plaintiff has no cause of action against this defendant, Oliver Chilled Plow Works, because the digger was not imminently dangerous.

The Court must first decide, as a matter of law,

from the description of the article in the complaint, whether the liability is created independent of contract. We have cited in the Points and Authorities cases in which the courts have held articles not to be dangerous, and we are confident that a reading of the decisions cited will show that articles a great deal more dangerous than the one described in the complaint have been held not to come within the class. The Court will see that these articles had hidden defects, on account of which defects persons were seriously injured or killed. We mention a few of the articles. A car with defective brakes; a defective freight elevator; defective tackle used in loading a ship; a defective threshing machine; a negligently constructed fly wheel. In these cases it was conceded and admitted that the manufacturer or seller was negligent in delivering the article in the condition which it was in, but that such negligence did not give rise to cause of action in favor of a servant of the consignee or a stranger.

Since there was no privity of contract between the plaintiff and this defendant, and since there was no liability independent of contract, as shown by the above cases, it follows that the demurrer to the complaint was properly sustained.

NOT PROXIMATE CAUSE.

We now pass to our second proposition. In Paragraph VI of the amended complaint it is alleged, after setting out the alleged dangerous condition of the digger, "all of which was well known to *defendant*

by properly inspecting the said digger before directing the plaintiff and other longshoremen to carry said digger aboard said steamship, as plaintiff was required to do, as it was *defendant's* duty so to do." Since there were two defendants and the negligence was charged against the "defendant," without designating which defendant, it becomes necessary, by a construction of the pleading, to determine which defendant was meant. An ambiguous pleading is construed against the pleader. The allegation, therefore, should be construed to mean the defendant Steamship Company. This construction is more evident when we consider that plaintiff was the employee of the Steamship Company and engaged by that Company for doing the very work in which he was injured.

In Paragraph VII of the amended complaint it is alleged that the injury "could have been prevented had the *defendants* exercised reasonable care in providing plaintiff with a safe place to work, and informing plaintiff of hidden and concealed dangers, or by crating and packing said potato digger, or by guarding, covering or removing the knives and other sharp parts thereof." Since it was the legal duty of the Steamship Company, and not this defendant's, to provide plaintiff with a safe place to work and to inform plaintiff of hidden and concealed dangers, the allegation is a legal conclusion, and in so far as it affects this defendant must be disregarded.

Considering the above quoted allegations of Paragraphs VI and VII as properly construed, it appears

that the accident would not have happened if the Steamship Company, plaintiff's master, had performed its duty to the plaintiff, its servant. That is to say, if the Steamship Company had exercised reasonable care to ascertain the danger by inspection, and when so ascertained, to have warned the plaintiff. A master's duty to his servant is a primary one, and cannot be delegated nor cast upon others.

This alleged negligence of the Steamship Company is subsequent in time to the alleged negligence of this defendant. This defendant's activities had ceased when it delivered the digger at the dock. From that time the digger was within the possession and control of the Steamship Company, and the acts and omissions of the Steamship Company, charged against the Company, were committed after this defendant's duty had ceased. The acts or omissions, therefore, of the Steamship Company constituted a cause intervening between the acts of this defendant and the injury.

The case as thus made is brought squarely within the ruling made in *Fowles v. Briggs,* (Mich.), 40 L. R. A. 528. In that case the plaintiff's intestate was a brakeman employed by a railroad company. The defendants were lumber dealers. They loaded a flat car with lumber in their yards, and shipped it over the railroad company's lines. The flat car loaded by the defendants, the lumber dealers, was so negligently and carelessly loaded that the pile of lumber slipped and crushed the brakeman, plaintiff's intestate. The complaint charged the negligence of the defendants

to be: "First, that they carelessly and recklessly loaded said flat car of said railroad company so as to cause the death of the deceased by the shifting of the lumber while upon said car; that said lumber was so loaded upon said car that it was not safe for an employee of said railroad company to couple it to another car, and that said danger was not apparent to deceased. Second, that it was the duty of said defendants not to ship maple lumber upon a flat car without having the lumber so fastened and staked as to hold it from shifting. Third, that a piece of timber or other material should have been placed crosswise upon the floor and near the ends of said flat car under the lumber, for the purpose of lifting the extreme ends of the lumber. Fourth, that the defendants loaded this lumber upon the deck of said car while the deck of said car was covered with ice and snow and sleet and in a slippery condition; and fifth, that the lumber should have been placed in a box car and not upon a flat car."

The cause was tried before a jury, but after the evidence was concluded the Court took the case from the jury, upon the ground that the defendants violated no duty they owed to the plaintiff's intestate. The Court took the case from the jury on two grounds, the one we have already argued, that the article delivered was not inherently dangerous, but also upon the other ground that the acts of the defendants were not the proximate cause of the injury, the proximate cause being the duty of the railroad

company to inspect the car and ascertain the danger and provide against it. The Court says:

> "In the present case the defendants owed the railroad company the duty of using ordinary care in loading the car in question, but before the car came to decedent it was the duty of the railroad company to provide for the inspection. It was the intervention of an independent human agency."

Then follows a discussion, with citations, supporting the proposition.

We submit that the demurrer was properly sustained, and judgment rendered in favor of the defendant in error.

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